IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2637 of 2003

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHHAGANBHAI NAROTTAMDAS PATEL & ANR.

Versus

GUJARAT SACHIVALAYA EMPLOYEES CO OP. CREDIT SOCIETY LTD.

Appearance:

MR BS PATEL for Petitioners Nos. 1-2
MR SN THAKKAR for the Respondent

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 12/03/2003

ORAL JUDGEMENT

This is a petition under Article 227 of the Constitution of India preferred by two of the judgment

debtors against the judgment and order dated 20th January, 2003 made by the Gujarat State Cooperative Tribunal (hereinafter referred to as 'the Tribunal') in Appeal No.549/2000.

The respondent herein is the judgment creditor, a cooperative credit society (hereinafter referred to as 'the Society'). The petitioners were, at the relevant time, the Honorary Secretary and the Honorary Joint Secretary in the Society.

In the year 1980 or there about a large scale fraud had been perpetrated upon the Society. A sum of Rs.36,27,323=58 ps. was alleged to have been misappropriated. On an inquiry, the Manager of the Society, four other paid servants of the Society, the present petitioners and the former auditor of the Society were found to be guilty. According to the said enquiry report, 80% liability of the misappropriated amount was fastened upon the Manager of the Society while the liability to the extent of 5% of the said amount was fastened upon the present petitioners and the former auditor. On an appeal by the said former auditor, the allegations made against the said auditor were set aside.

The custodian of the Society filed Arbitration Suit No.1903/1992 before the Board of Nominees, Ahmedabad for recovery of a sum of Rs.37,99,077=20 ps. against the six delinquents. Neither of the said six delinquents appeared before the Board of Nominees nor did they defend the suit. Under the judgment and order dated 7th April, 1995, the suit was decreed; all the defendants were jointly and severally held liable for the suit amount and the interest @ 12% per annum. The petitioners herein filed Restoration Application No.164/1996 for setting aside the award made by the Board of Nominees. The same was rejected on 26th September, 2000. The petitioners preferred Appeal No.549/2000 while rest of the defendants preferred Appeal Nos.236/1999, 240/1999, 280/1999 and 338/1999. All the appeals have been dismissed under the common judgment and order dated 20th January, 2003. Feeling aggrieved, the petitioners have preferred the present petition.

Mr.Patel has submitted that the petitioners could not remain present and defend the suit for the reasons beyond their control. In the circumstances, the Board of Nominees ought to have set aside the decree passed against the petitioners. Mr.Patel has further submitted that the suit was based solely on the report of the enquiry. Under the said report, the present petitioners

were held liable for a mere 5% of the amount allegedly misappropriated. The Board of Nominees, therefore, could not have passed decree holding the petitioners jointly and severally liable for the entire decretal amount. He has submitted that the Tribunal has failed to appreciate the contention raised by the petitioners. He has next submitted that under Section 93 of the Act the Registrar is empowered to proceed against the delinquents pursuant to the report submitted by the Inquiry Officer under Section 86 of the Act. However, in the present case, instead of proceeding under Section 93 of the Act the Society has proceeded against the petitioners and the other defendants under Section 96 of the Act. The suit filed under Section 96 of the Act is clearly barred. In support of his contentions, Mr.Patel has relied upon the judgments of this Court in the matters of THAKORBHAI L.PATEL AND ORS. V/S. ASSISTANT DISTRICT REGISTRAR, COOPERATIVE SOCITIES, VALSAD AND ORS. [2001(3) G.L.R. 1921] and of NAVNITLAL L.KHAKHKHAR V/S. HASMUKHLAL G.SOLANKI [1987(2) G.L.R. 1134].

I am unable to agree with either of the contentions raised by Mr.Patel. The application for restoration of the suit instituted by the present petitioners has been placed on the records of the matter. The grounds, which prevented the petitioners from appearing before the Board of Nominees and from defending the suit, stated in the said application, did not appeal to the Board of Nominees nor did they appeal to the Tribunal. The said grounds do not seem to be palatable to this Court either. In my view, therefore, the Board of Nominees and the Tribunal were justified in not accepting the said grounds.

In the matter of Navnitlal L.Khakhkhar (supra), this Court has emphasized on the necessity of deciding matters on merits rather than on technical grounds. It has been held that "...While it is true that there has to be a convincing proof about the legitimate reason for a party to remain absent at the hearing of the matter, the Court must not over-look the important consideration that the cases before the Court should be decided as far as possible on merits and not on mere technicalities." On the facts of the case, the Court held that "...the Court below should have accepted the medical certificate as correct and the ground for remaining absent should have been considered sufficient. It should have set aside the ex parte decree and disposed of the case on merits."

Obviously, this judgment shall have no applicability to the facts of the present case. First,

the suit filed before the Board of Nominees has not been disposed of for want of presence of the defendants. The plaintiff had led evidence and the suit has been decided on the basis of the evidence on record; second, neither of the defendants including the present petitioners responded to the summons issued by the Board of Nominees. Neither of them remained present before the Board of Nominees nor did they file their respective written statement. No cogent reason has been given by the petitioners for remaining absent before the Board of Nominees. On the contrary, the reasons stated by the petitioners in their application are ex facie unbelievable. Moreover, the same are denied by the custodian of the Society.

In the matter of Thakorbhai L.Patel and Ors. (supra), this Court has held that "having received the inquiry report under Section 86 of the Act, the Registrar ought to have proceeded further as envisaged under Section 93 of the Act. Section 93 of the Act being a special provision, the Liquidator could not have made an order of recovery under Section 110 of the Act." Mr.Patel has submitted that provisions under Section 96 of the Act are also general provisions. Considering the special provisions contained in Section 93 of the Act, the suit under Section 96 of the Act was not maintainable. I am unable to agree with this contention also. It is not disputed that Section 93 makes a special provision empowering the Registrar to proceed against the delinquent persons in accordance with the said provision. However, that is a special empowerment given to the Registrar. The individual society or its managing committee has no power to take recourse under Section 93 of the Act. The only remedy available to such society is resolution of the dispute under Section 96 of the Act.

Section 93 of the Act is placed in Chapter VIII of the Act under the heading "Audit, Inquiry, Inspection and Supervision". Section 93 is preceded by Sections 84 to 92 in the said Chapter. Section 84 of the Act enjoins the Registrar to audit or cause to be audited the accounts of every society atleast once in each year. Section 85 of the Act enjoins the society to explain and to rectify any defect or irregularity pointed out by the auditor. It also empowers the Registrar to make order directing the society or its officers to remedy the defects. Section 86 of the Act empowers the Registrar himself or by a person authorized by him to hold an inquiry into the constitution working and financial condition of a society of his own motion. Sub section (2) thereof enjoins the Registrar to hold such inquiry on the requisition of a society or on the application of a

majority of the committee of the society or on the application of 1/3rd of the members of the society. Section 87 of the Act empowers the Registrar, inter alia, to inspect the books of the society on an application made by a creditor of such society. Section 93 of the Act empowers the Registrar to cause an inquiry and to enforce recovery of any money misapplied or retained, etc. pursuant to the report made by the auditor under Section 84 of the Act or made on an inquiry under Section 86 of the Act or on inspection under Section 87 of the Act or by liquidator under Section 110 of the Act. Thus, the powers conferred upon the Registrar under Section 93 of the Act are administrative powers circumscribed by the preceding sections in the said Chapter VIII i.e. such powers can be exercised only on a report received under Sections 84, 86, 87 or 110 of the Act as the case may be. Whereas Section 96 of the Act is placed in Chapter IX of the Act under the heading "Procedure for deciding disputes". The said Section 96 is of a wide amplitude and applies to a wide range of disputes with respect to a society. The reference of dispute under Section 96 is not circumscribed by any condition precedent. Reference of such dispute can be made at the instance of any of the parties to the dispute. Hence, in my view, Sections 93 and 96 of the Act are independent provisions in different chapters and operate in separate fields. Section 93 of the Act pertains to the administrative power of the Registrar resulting from audit, inquiry or inspection, whereas Section 96 of the Act relates to the vested rights of the parties to raise a dispute for settlement by the Registrar or its nominee. If the construction canvassed by Mr.Patel were accepted the same would result in denying and denuding a society the statutory remedy under Section 96 of the Act. If it were to be held that remedy under Section 96 is excluded, the matter would fall purely in discretion of the Registrar to inquire or not to inquire into a misconduct by any officer, agent or servant of the society. The society would lose a specific remedy provided by the Act. Such construction, therefore, cannot be countenanced. A Full Bench of the Patna High Court also has taken a similar view in the matter of KINJER VYAPER MANDAL SAHYOG SAMITI LTD. V/S. DEPUTY REGISTRAR, CO-OPERATIVE SOCIETIES, PATNA DIVISION AND OTHERS [A.I.R. 1986 Patna 206].

As to the limited liability fastened upon the petitioner, it must be noticed that it was mere conclusion drawn by the Inquiry Officer; the same would not be binding upon the Board of Nominees. In absence of any defence put-forth by the defendant, the Board of Nominees was wholly justified in passing the decree

against the defendants as has been done in the present case.

No other contention is raised before me. The petition is dismissed in limine.

(Ms. R.M. Doshit, J.)

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